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COURT OF CRIMINAL APPEALS
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TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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No. PD-0941-17

***Christian Vernon Sims*, Appellant**

v.

***State of Texas*, Appellee**

On Discretionary Review from the Sixth Court of Appeals
No. 06-16-00198-CR

On Appeal from the 6th District Court, Lamar County
No. 26338

Appellant's Brief

Michael Mowla
P.O. Box 868
Cedar Hill, TX 75106
Phone: 972-795-2401
Fax: 972-692-6636
michael@mowlalaw.com
Texas Bar No. 24048680
Attorney for Appellant

I. Identity of Parties, Counsel, and Judges

Christian Vernon Sims, Appellant

Michael Mowla, attorney for Appellant (discretionary review)

Don Biard, attorney for Appellant (direct appeal)

Gena Bunn, attorney for Appellant (trial)

Jason Parrish, attorney for Appellant (trial)

State of Texas, Appellee

Gary Young, Lamar County District Attorney

Jill Drake, Lamar County Assistant District Attorney

Kelsey Doty, Lamar County Assistant District Attorney

Jeff Shell, special prosecutor

Stacey Soule, State Prosecuting Attorney

John Messinger, Assistant State Prosecuting Attorney

Judge Bill Harris, presiding judge, 6th District Court, Lamar County

Chief Justice Josh Morriss III, Sixth Court of Appeals

Justice Bailey Mosely, Sixth Court of Appeals

Justice Ralph Burgess, Sixth Court of Appeals

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- *Sims v. State*, 526 S.W.3d 638 (Tex. App. Texarkana 2017)

To the Honorable Judges of the Texas Court of Criminal Appeals:

Appellant Christian Vernon Sims respectfully submits this Brief:

V. Statement of the Case, Procedural History, and Statement of Jurisdiction

Appellant asks this Court to review the Opinion and Judgment ("Opinion") of the Sixth Court of Appeals in *Sims v. State*, 526 S.W.3d 638 (Tex. App. Texarkana 2017) (*see* Appendix), in which the Court of Appeals affirmed the *Judgment of Conviction by Court – Waiver of Jury Trial* ("Judgment") and sentence (CR.421-422)[1] imposed on October 18, 2016 in the 6th District Court of Lamar County for Murder, for which Appellant was sentenced to 35 years in TDCJ-ID. (RR4.17; CR.421-422); *see* Tex. Penal Code § 19.02 (2014).

On July 27, 2015, a grand jury indicted Appellant for Murder, alleging that on or about December 18, 2014, in Lamar County, Texas, Appellant "…intentionally and knowingly" caused the death of Annie Sims by shooting her with a firearm. (CR.182).

Appellant filed a motion to suppress: (1) the warrantless seizure of the location-data evidence ("pinging") of a cellphone under the Fourth Amendment and Tex. Code Crim. Proc. Art. 38.23(a) (2016), (2) the warrantless arrest of Appellant under the Fourth Amendment and Tex. Code Crim. Proc. Art. 38.23(a) (2016), (3)

[1] The record on appeal consists of the Clerk's Record, cited by "CR" and the page number, and the Reporter's Record, cited as "RR" followed by the volume number and page or exhibit number ("SX" for State's exhibits or "DX" for Appellant's exhibits).

statements made by Appellant in violation under *Miranda v. Arizona*, 384 U.S. 436 (1966) and Tex. Code Crim. Proc. Art. 38.22 (2016), and (4) the sufficiency of the probable cause affidavits under the Fourth Amendment and Tex. Code Crim. Proc. Art. 38.23(a) (2016). (CR.240-245.362-387).

On September 27, 2016 and October 13, 2016, hearings were held on Appellant's motion to suppress evidence. (RR2, RR3). After considering the evidence and arguments, the trial court denied the motion to suppress evidence. (CR.390-391). The trial court entered findings of fact and conclusions of law. (CR.423-428).

After the trial court denied the motion to suppress evidence, in exchange for a 35-year prison sentence, Appellant changed his plea to "guilty" for Murder. (RR4.17; CR.421-422); *see* Tex. Penal Code § 19.02 (2014). As reflected *in the Trial Court's Certification of Defendant's Right to Appeal*, Appellant reserved his rights to appeal the issues raised and rejected on the motion to suppress evidence. (CR.407).

On June 20, 2017, the Court of Appeals affirmed the Judgment and sentence. *Sims*, 526 S.W.3d 638 (*see* Appendix).

On October 29, 2017, Appellant filed the petition for discretionary review ("PDR"). *Sims v. State*, No. PD-0941-17 (Tex. Crim. App., pet. filed Oct. 29, 2017). On February 14, 2018, this Court granted the PDR on Grounds 1 and 2. *Sims v. State*,

No. PD-0941-17 (Tex. Crim. App., pet. gr.). This Brief follows. Thus, this Court has jurisdiction over this case.

VI. Statement Regarding Oral Argument

The Court has not permitted oral argument. *See* Tex. Rule App. Proc. 68.4(d) (2018).

VII. Grounds Presented

Ground 1: The Court of Appeals erred by ruling that under Tex. Code Crim. Proc. Art. 38.23(a), violations of the Federal Stored Communication Act ("SCA") and Tex. Code Crim. Proc. Art. 18.21 do **not** require suppression of evidence pertaining to the warrantless pinging of a cellphone because: (1) the plain-language of Tex. Code Crim. Proc. Art. 38.23(a) states that **no** evidence obtained by an officer or other person in violation of any provisions of Texas or federal law shall be admitted in evidence against the accused; (2) Tex. Code Crim. Proc. Art. 38.23(a) is intended to provide greater protection than the Fourth Amendment; and (3) it is irrelevant that the SCA and Tex. Code Crim. Proc. Art. 18.21 do **not** provide that suppression is available since they are laws of Texas and the United States, and **neither** prohibits suppression of illegally obtained evidence under Art. 38.23(a).

Ground 2: The Court of Appeals erred by holding that Appellant was **not** entitled to a reasonable expectation of privacy in the real-time, tracking-data that was illegally seized because under the Fourth Amendment and Tex. Code Crim. Proc. Art. 38.23(a), a person has a legitimate expectation of privacy in real-time tracking-data regardless of whether he is in a private or public location.

VIII. Facts

On December 18, 2014, at about 2:30 p.m., Appellant's grandmother, Annie Sims, was found dead in her Powderly, Texas, home. (RR3.7). Appellant lived with Ms. Sims. The cause of death was a gunshot wound to her head. (RR2.96). The police discovered that a handgun, Ms. Sims's vehicle, a 2012 Toyota Highlander, and her purse (and its contents) were missing. (RR2.102.111). Appellant was not home when the police arrived.

Not long before Ms. Sims's body was discovered, a charge appeared on one of Mike Sims's credit cards in McAlester, Oklahoma. (RR2.104). Mike Sims is Ms. Sims's husband and Appellant's grandfather. (RR2.14).

The police immediately suspected that Appellant and his girlfriend, Ashley Morrison were responsible for the death and the missing property. (RR2.86-89). Annie's vehicle, and Annie's purse, its contents including credit cards and at least one handgun were missing. (RR2.96). Officers suspected that Appellant and Morrison caused Annie's death and had taken the missing items from Annie's house. (RR2.84). With the help of Mike Sims and Matt Sims (Appellant's father), the police began looking for Appellant and Morison. (RR2.98). The police identified Sims and Morrison as having made the charge on the credit card in McAlester. (RR2.97-98).

On the same day, beginning at about 5:00 p.m., by using information from cell towers along Indian Nation Turnpike in Oklahoma and without a warrant, officers

had Verizon Wireless (with which Appellant subscribed) "ping" (track) Appellant's cellphone. (RR2.93.115-119; RR3.10-11). Although the Verizon account was in Mike Sims's name, Appellant purchased the phone a year before, owned the phone, always had possession of the phone, and Mike Sims never had custody of or used the phone. (RR2.128-130).

An exigent-circumstances form (Emergency Situation Disclosure) had been submitted to Verizon, the cellphone provider. (RR2.107.120-121; RR5.SX-4B). The form does not have any explanation regarding what the "exigent-circumstance" may be. (RR2.125; RR5.SX-4B). All the form asks is "Does this request potentially involve the danger of death or serious physical injury to a person, necessitating the immediate release of information relating to that emergency?," with "Yes" or "No" checkboxes. (RR2.125; RR5.SX-4B). No application under Tex. Code Crim. Proc. Art. 18.21 was submitted for the information. (RR2.118-119).

From the tracking-data obtained from Verizon, the police learned that the cellphone was moving northbound on the Indian Nation Turnpike just north of McAlester. (RR2.99). Later, the officers learned that the cellphone was at a truck-stop in Sapulpa, Oklahoma, Creek County, which is about an hour-and-a-half north of McAlester on the Indian Nation Turnpike. (RR2.21.99.118). Based on this information, at about 5:53 p.m., a BOLO (be on the lookout) was issued for a stolen

vehicle that was being driven by two possible murder suspects. (RR2.45-46.49.54-55.59).

Shortly after the Oklahoma officers received this information from Lamar County (RR2.108), officers from Oklahoma found Ms. Sims's vehicle and matched its license number in the parking lot of a motel across the truck-stop on Highway 75. (RR2.21-22). The officers spoke to a motel employee, who told them that Appellant and Morrison had rented room 275. (RR2.23.28). An officer contacted Appellant using the phone, and Appellant and Morrison were sometime after 7:00 p.m. and 8:25 p.m. after they exited the room. (RR2.23-26.59-62; RR3.11). Appellant was in possession of a gun, which was found in the room. (RR2.42.62.67).

The officers did **not** have a warrant to arrest Appellant. (RR2.28.31.35.37.64-65). Nor was a warrant obtained to obtain the electronic "pinging" information. (RR2.56). No attempt to obtain a warrant was made. (RR3.13). And, other than the information they already had received from their dispatch and another law-enforcement agency based on cell-phone pinging before they arrived at the motel, there was **no** evidence of apparent illegal activity in the room (i.e., nobody was entering or exiting the room, nobody was yelling or screaming in or about the room). (RR2.32-33.38-39.55-56.59). Upon arrest, Appellant was not "Mirandized." (RR2.89-91). Soon after his arrest, Appellant volunteered to the officers that "[Morrison] had nothing to do with it. It was all me." (RR2.36).

IX. Summary of the Arguments

Appellant will first argue that the Court of Appeals erred by ruling that under Tex. Code Crim. Proc. Art. 38.23(a), violations of the SCA and Tex. Code Crim. Proc. Art. 18.21 do **not** require suppression of evidence pertaining to the warrantless pinging of a cellphone because: (1) the plain-language of Tex. Code Crim. Proc. Art. 38.23(a) states that **no** evidence obtained by an officer or other person in violation of any provisions of Texas or federal law shall be admitted in evidence against the accused; (2) Tex. Code Crim. Proc. Art. 38.23(a) is intended to provide greater protection than the Fourth Amendment; and (3) it is irrelevant that the SCA and Tex. Code Crim. Proc. Art. 18.21 do **not** provide that suppression is available since they are laws of Texas and the United States, and **neither** prohibits suppression of illegally obtained evidence under Art. 38.23(a).

Second, Appellant will argue that the Court of Appeals erred by holding that he was **not** entitled to a reasonable expectation of privacy in the real-time, tracking-data that was illegally seized because under the Fourth Amendment and Tex. Code Crim. Proc. Art. 38.23(a), a person has a legitimate expectation of privacy in real-time tracking-data regardless of whether he is in a private or public location.

X. Argument

1. **Ground 1: The Court of Appeals erred by ruling that under Tex. Code Crim. Proc. Art. 38.23(a), violations of the Federal Stored Communication Act ("SCA") and Tex. Code Crim. Proc. Art. 18.21 do not require suppression of evidence pertaining to the warrantless pinging of a cellphone because: (1) the plain-language of Tex. Code Crim. Proc. Art. 38.23(a) states that no evidence obtained by an officer or other person in violation of any provisions of Texas or federal law shall be admitted in evidence against the accused; (2) Tex. Code Crim. Proc. Art. 38.23(a) is intended to provide greater protection than the Fourth Amendment; and (3) it is irrelevant that the SCA and Tex. Code Crim. Proc. Art. 18.21 do not provide that suppression is available since they are laws of Texas and the United States, and neither prohibits suppression of illegally obtained evidence under Art. 38.23(a).**

i. Introduction

Appellant asks this Court to resolve whether Tex. Code Crim. Proc. Art. 38.23(a) (2016) may be invoked by a defendant who seeks suppression of evidence obtained in violation of a law of Texas or the United States even if the law (of Texas or the United States even if the law) does **not** address whether suppression under Art. 38.23(a) is available. The Texas Legislature intended that Tex. Code Crim. Proc. Art. 38.23(a) (2016) apply where other laws or constitutional provisions may **not**. There is little guidance on this issue other than some federal caselaw. However, the broad protections of Art. 38.23(a) are **not** available to those charged with federal crimes because the Texas Legislature never intended for it to be.

Appellant asserts violations of two statutes: 18 U.S.C. §§ 2701-2712 (2016) (the SCA), and Tex. Code Crim. Proc. Art. 18.21 (2016), *Pen Registers and Trap and Trace Devices; Access to Stored Communications; Mobile Tracking Devices*. Although these are the specific statutes Appellant complains of, the implications of the issues in this case are far-reaching and cover circumstances not only present in this case but also in other cases in the future.

For instance, 18 U.S.C. § 2703(a) (2016), also part of the SCA, requires that a "provider of electronic communication service" disclose to the government "the contents of a wire or electronic communication that is in electronic storage in an electronic communications system" for 180 days or less, "only" per a warrant issued using procedures described by the Fed. Rule Crim. Proc. or state warrant-procedures, which in Texas falls under Chapter 18 of the Tex. Code Crim. Proc., and primarily Tex. Code Crim. Proc. Art. 18.01 (2016) and Tex. Code Crim. Proc. Art. 18.21 (2016).

The government may require disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than 180 days under 18 U.S.C. § 2703(b) (2016), which requires disclosure if the government produces a search warrant, an administrative subpoena "authorized by

a Federal or State statute or a Federal or State grand jury or trial subpoena," or a court order under 18 U.S.C. § 2703(d) (2016).

To obtain a court order under 18 U.S.C. § 2703(d) (2016), the government must present "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." And in the case of a "State governmental authority," the court order "shall not issue if prohibited by the law of such State."

However, these directives are meaningless if there is **no** incentive for the government to follow them. And, the only viable incentive is suppression of the evidence. The reason is because criminal penalties for violation of the SCA are set forth in 18 U.S.C. § 2701(b) (2016). Although the penalties appear stiff, a cursory reading of the statute shows that these criminal penalties would **never** apply to a member of law enforcement who violates the SCA to obtain evidence.

Under 18 U.S.C. § 2701(b) (2016), (1) if the offense is committed for commercial advantage, malicious destruction or damage, private commercial gain, or to commit a criminal or tortious act in violation of the Constitution or laws of the United States or any State, the penalty is a fine or prison up to 5 years, or both (or a fine or prison up to 10 years for subsequent offenses, or both); or (2) in any other

case, a fine or prison up to 1 year or both (or a fine or prison up to 5 years for subsequent offenses).

But, as provided by 18 U.S.C. § 2701(a) (2016), to be subjected to the criminal penalties, one must: (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceed an authorization to access the facility and in doing so, obtain, alter, or prevent authorized access to a wire or electronic communication while it is in electronic storage. Because in every case the provider would provide access (and thus there is "authorization"), unless the governmental agency hacks into the provider's datacenter (very unlikely), there would **never** be a criminal penalty accessed against a governmental entity under the SCA. This conclusion is provided in plain language by 18 U.S.C. § 2701(c) (2016), which exempts from criminal liability conduct authorized: (1) by the person or entity providing a wire or electronic communications service; (2) by a user of that service with respect to a communication of or intended for that user; or (3) under 18 U.S.C. §§ 2703, 2704 or 2518. Thus, the notion of the criminal penalties under 18 U.S.C. § 2701 (2016) acting as a deterrent to law enforcement violating the SCA is a **legal fiction**.

Next, civil damages are authorized under 18 U.S.C. § 2707 (2016). However, 18 U.S.C. § 2708 (2016) does **not** allow other remedies or sanctions for nonconstitutional violations of the SCA, and there is no statutory exclusionary rule

in the SCA. This means that evidence obtained in violation of the SCA will always be admissible in court unless the Fourth Amendment is violated, which will never happen due to the way the SCA is written. Or, unless this Court finds that Art. 38.23(a) reaches violations of the SCA, as will be argued below. Perhaps information obtained in violation of the SCA would not be admitted into evidence if a privilege is violated, such as the attorney-client privilege, but this is due not to the SCA but due to the Sixth Amendment and Tex. Rule Evid. 503 (2018).

There are also issues regarding protections under search-warrant provisions of 18 U.S.C. § 2518 (2016) (Federal Wiretap Act) and the SCA under 18 U.S.C. § 2703 (2016) concerning protection allowed information that is in **transmission** versus information that is in storage with the provider. Under 18 U.S.C. § 2518(3) (2016), the government may intercept electronic evidence without the knowledge of the owner if the government has received a court order based on probable cause and a showing that normal investigative procedures: (1) have been tried and failed; (2) reasonably appear to be unlikely to succeed if tried; or (3) are too dangerous to try. Yet under 18 U.S.C. § 2703(a) (2016), as explained above, the government may search information stored with the provider for 180 days or less if the government obtains a search warrant issued using under procedures federal or state procedural rules. Thus, the search can be done without the owner's knowledge. In fact, the Department of Justice ("DOJ") believes that it is **not** required to comply

with 18 U.S.C. § 3103a (2018) (grounds for issuing a search warrant) and Fed. Rule Crim. Proc. 41 (2018) (search and seizure) to conduct a search without notice to the owner of the information. Rather, the DOJ believes that the SCA requires notice only to the provider, which is a pointless "notice" requirement since the provider will always receive "notice" when it is served with a search warrant, subpoena, or court order. *See* S*earching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* published by the Computer Crime and Intellectual Property Section, Crim. Div., U.S. Dep. of Justice, 133-134 (Jan. 2015), available at https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ccmanual.pdf, last visited April 1, 2018. As noted in the DOJ manual, there is no consideration of "alternative investigative techniques" before federal agents may conduct a search without the knowledge of the owner of the data. In fact, Fed. Rule Crim. Proc. 41(f)(3) (2018) provides a vague "delayed notice" rule, which upon the government's request (and the government almost always so requests) a federal or state judge may delay any notice required under Rule 41 "if the delay is authorized by statute." The "statute(s)" are 18 U.S.C. § 2705 (2016) (Delayed Notice) and 18 U.S.C. § 3103a(b) (2018), which allow delayed notice in nearly all conceivable situations, including where the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an "adverse result," which in turn means "endangering the life or physical

safety of an individual; flight from prosecution; destruction of or tampering with evidence; intimidation of potential witnesses; or otherwise seriously jeopardizing an investigation or unduly delaying a trial." Undersigned counsel **cannot** think of a situation that would fall outside of one of these categories. Further, none of the safeguards under the Federal Wiretap Act concerning the interception or collection of data are found within the SCA.

Thus, without the safeguards of Art. 38.23(a), the SCA and Tex. Code Crim. Proc. Art. 18.21 (2016) allow law enforcement to violate the rules within the SCA and Art. 18.21 with impunity and **not** be concerned about the only viable penalty, suppression of evidence. Appellant thus will ask this Court to hold that Tex. Code Crim. Proc. Art. 38.23(a) (2016) may be invoked by a defendant who seeks suppression of evidence obtained in violation of a law of Texas or the United States even if the law (statute or otherwise) does **not** address whether suppression under Art. 38.23(a) is available. Appellant will also ask this Court to reverse the Opinion of the Court of Appeals since it contains critical errors, and most importantly, inserted nonexistent language into Art. 38.23(a) and the relevant statutes.

ii. The plain-language of Tex. Code Crim. Proc. Art. 38.23(a) states that no evidence obtained by an officer or other person in violation of any provisions of Texas or federal law shall be admitted in evidence against the accused.

The plain-language of Tex. Code Crim. Proc. Art. 38.23(a) (2016) provides, "**No** evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." This language does **not** state that illegally obtained evidence must be suppressed only if the Texas or federal law violated specifically allows for suppression. **Nor** is the plain-language of Art. 38.23(a) qualified in any other way or is there any indication in the language or in caselaw that Art. 38.23 is a "general" statute.

It is well-established that when an appellate court interprets a statute, it should "look solely to the plain language of the statute for its meaning unless the text is ambiguous or application of the statute's plain language would lead to an absurd result that the Legislature could not possibly have intended." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991); *Jaubert v. State*, 74 S.W.3d 1, 2 (Tex. Crim. App. 2002). A plain-language reading of Art. 38.23(a) should cause this Court to grant the relief requested.

This section is divided into three parts. Appellant will first explain that the language of the SCA says **nothing** about another jurisdiction (such as Texas) being

prohibited from allowing other remedies under its laws, so Texas courts should follow the plain-language of Art. 38.23(a) and provide relief in situations where the Fourth Amendment does **not**. Second, Appellant will explain that although Texas is **not** alone in providing laws that provide greater protection than the Fourth Amendment, but **no** other state's law offers the broad protections of Art. 38.23(a). Finally, Appellant will show that a violation of law found in statutes does **not** prohibit suppression under Art. 38.23(a).

First, the language of the SCA says **nothing** about another jurisdiction (such as Texas) being **prohibited** from allowing other remedies under its laws, so Texas courts should follow the plain-language of Art. 38.23(a) and provide relief in situations where the Fourth Amendment does **not**. Under 18 U.S.C. § 2707 (2016), a person whose privacy rights are violated may bring a civil action against the offending party. Under 18 U.S.C. § 2708 (2016), "[T]he remedies and sanctions described in [18 USCS §§ 2701 *et seq*.] are the only judicial remedies and sanctions for nonconstitutional violations of [18 USCS §§ 2701 *et seq*.]. Thus, under the SCA, the civil action allowed under 18 U.S.C. § 2707 (2016) is the remedy or sanction available to an aggrieved party. The language says **nothing** about another jurisdiction (such as Texas) being **prohibited** from allowing other remedies under its laws, like Tex. Code Crim. Proc. Art. 38.23(a) (2016). **Nor** does the language say anything about suppression under a broader state statute being **prohibited**.

The fact that Art. 38.23(a) offers broader protection than the Fourth Amendment should **not** be taken lightly. In fact, Art. 38.23(a) has been described as a statute that "…[l]ays down a rule far broader than that existing in any other state and goes much beyond the doctrine of the [federal] cases." 1 C. McCormick & R. Ray, *Texas Law of Evidence*, § 473 (2d ed. 1956). Nor should the fact that the language says **nothing** about another jurisdiction (such as Texas) being **prohibited** from allowing other remedies under its laws be taken lightly.

When a legislature (Texas or Congress) passes a criminal statute that narrowly addresses prohibited conduct, and the same conduct is addressed by a broader statute, prosecutors are **not** prohibited from prosecuting under a broader statute if the broader statute allows more severe penalties. In fact, provided that the prosecution is not for an improper purpose, it is up to the prosecutor under which statute the prosecution may proceed.

The practical, specific effect of the specific-versus-broad-language-issue is that prosecutors can obtain more pleas of guilty since a defendant is more likely to plead guilty if the potential punishment is greater. The broader effect of the specific-versus-broad-language-issue is that legislatures and the courts allow prosecutors the discretion to choose between a broad versus narrow statute to prosecute the same conduct provided the decision to prosecute is **not** selective or invidious. *See* *Ball v. United States*, 470 U.S. 856, 859 (1985) ("It is clear that a convicted felon may be

prosecuted simultaneously for violations of §§ 922(h) (broader statute) and 1202(a) (specific statute) involving the same firearm (and conduct of using a weapon in a kidnapping/ransom situation). This Court has long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a case); citing *United States v. Batchelder*, 442 U.S. 114, 123-125 (1979) (Provided that the prosecution is not for a discriminatory purpose, a prosecutor may prosecute conduct under any statute available for that conduct and obtain the corresponding penalty); *United States v. Howard*, 13 F.3d 1500, 1503 (11th Cir. 1994) (Although the penalty under one statute in the SCA [18 U.S.C. § 2512] was different than the conduct proscribed by 47 U.S.C. § 605, the prosecutor was free to prosecute under either statute provided there is no discrimination against a class of defendants); and *United States v. Bilzerian*, 926 F.2d 1285, 1301 (2d Cir. 1991) (A prosecution is allowed under a general statute with harsher penalties although the conduct is covered by specific statutes).

The common theme here is that where the general, broader statute does not limit prosecution for certain conduct only under it, and the specific statute (for the same conduct) also does not limit prosecution only under it, even if one punishes more severely than the other, the prosecutor may choose between the two statutes. So, if the government may prosecute the same conduct and choose between a

general, broader statute and a specific statute, then a defendant should be allowed to invoke a statute or law that provides broader protections. This is what Art. 38.23(a) does: it "…[l]ays down a rule far broader than that existing in any other state and goes much beyond the doctrine of the [federal] cases." McCormick, *id.* at § 473. **No** language in either the SCA or Art. 18.21 provides that Art. 38.23 may not be invoke. Nor is there any language in either law that states that a defendant may not invoke a state statute [like 38.23(a)] that provides greater protections.

Second, although Texas is **not** alone in providing laws that provide greater protection than the Fourth Amendment, but **no** other state's law offers the broad protections of Art. 38.23(a). Under Tex. Code Crim. Proc. Art. 18.21 §§ 12-13 (2016), a person whose privacy rights are violated may bring a civil suit, and "[T]he remedies and sanctions described in this article are the exclusive judicial remedies and sanctions for a violation of this article other than a violation that infringes on a right of a party guaranteed by a state or federal constitution." Like the SCA, this language **neither** prohibits an aggrieved party from seeking relief for a violation under Tex. Code Crim. Proc. Art. 38.23(a) (2016), **nor** prohibits suppression under Art. 38.23(a). The language in fact allows suppression under Tex. Const. Art. I, § 9 ("state constitution"). Thus, if protections under Tex. Const. Art. I, § 9 **equals** protections under the Fourth Amendment, *see* *Hulit v. State*, 982 S.W.2d 431, 436 (Tex. Crim. App. 1998), and Art. 38.23(a) offers greater protections than the Fourth

Amendment (see [ii] below), then Art. 38.23(a) applies to violations of Art. 18.21 and offers greater protections.

And, it is long-established that that Art. 38.23(a) should be construed according to its "plain" language unless this would lead to "absurd results." *Johnson v. State*, 939 S.W.2d 586, 587-588 (Tex. Crim. App. 1998); *see also Wehrenberg v. State*, 416 S.W.3d 458 (Tex. Crim. App. 2013) (To determine the meaning of Art. 38.23(a), "No evidence obtained in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case," courts should examine its plain language.). Based on the plain-language, there is, for instance, insufficient support for the conclusion that Art. 38.23(a) applies only to "state action" or is intended to incorporate only federal exclusionary rule jurisprudence. *See, e.g., Johnson*, 939 S.W.2d at 588-593 (McCormick, P.J., dissenting).

Rather than consider its plain-language, the Court of Appeals inserts language into Tex. Code Crim. Proc. Art. 38.23(a) (2016) and the relevant statutes: "**Without providing any exclusionary rule**, the SCA provides for civil actions for violations of its terms and makes the remedies and sanctions described in this chapter exclusive. See 18 U.S.C. §§ 2707 (civil actions), 2708 (exclusivity of remedies)." The Court of Appeals appears to believe that for Art. 38.23(a) or Tex. Const. Art. I,

§ 9 to apply, the SCA and Tex. Code Crim. Proc. Art. 18.21 (2016) must provide an "exclusionary rule." This is error, as such language does **not** exist in Art. 38.23(a).

Further, Texas is **not** alone in providing laws that provide greater protection than the Fourth Amendment, but **no** other state's law offers the broad protections of Art. 38.23(a). For instance, in Massachusetts, Article 14 of the Massachusetts Declaration of Rights provides greater protections than the Fourth Amendment. *See* A.L.M. Constitution Pt. 1, Art. XIV; *Commonwealth v. Blood*, 507 N.E.2d 1029, 1036-1037 (Mass. 1987) (greater protections against wiretaps); and *Commonwealth v. Upton*, 476 N.E.2d 548, 556 (Mass. 1985) (Art. 14 provides more substantive protection to criminal defendants than does the Fourth Amendment in the determination of probable cause.). Article 14 provides:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

This Court will notice that although the Supreme Judicial Court of Massachusetts has held that Article 14 provides greater protections than the Fourth Amendment, it does **not** contain the key language in Art. 38.23(a) of "**No** evidence obtained by an officer or other person in violation of any provisions of the

Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." This Court will also notice that Article 14 is merely a more detailed version Tex. Const. Art. I, § 9 ("The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.").

The same can be said in Pennsylvania, where Pa. Const. Art. I, § 8 provides greater protection against searches and seizures than the Fourth Amendment. *See* *Commonwealth v. Smith*, 836 A.2d 5, 15 (Pa. 2003). Article I, § 8 provides,

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Unlike Massachusetts's Article 14, which is a more detailed version of Tex. Const. Art. I, § 9, Pennsylvania's Pa. Const. Art. I, § 8 is nothing more than a slightly reworded version of Tex. Const. Art. I, § 9. *See also* *State v. Hehman*, 578 P.2d 527, 528-529 (Wa. 1978) (The Washington Constitution grants greater protections than the Fourth Amendment for custodial arrests following minor traffic violations).

Some cases and writers have referred to the ability of state supreme courts and state legislatures to write laws that afford greater protections than the U.S. Constitution as the "new federalism." The issue of the "new federalism" was discussed in length by Justice Brennan in a 1977 law review article. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 500 (1977). As Justice Brennan explained, "while this results in a divergence of meaning between words which are the same in both federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law…" (internal citations omitted). And, as Brennan further explained, "[d]ecisions of the [U.S. Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them." *Id*. at 502 (footnote omitted).

The concept of state supreme courts and legislatures providing greater protections of individual liberties than the U.S. Constitution has been trending for several decades. The Supreme Court of Texas observed in 1992 that "[W]hen a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the

fullest protection of their rights." *Davenport v. Garcia*, 834 S.W.2d 4, 12 (Tex. 1992) (comparing the free-speech guarantee of Tex. Const. Art. I, § 8 (Freedom of Speech and Press; Libel) with the First Amendment in a case concerning prior restraint on speech and expression). As the Supreme Court of Texas discussed, Tex. Const. Art. I, § 8 may be broader than the First Amendment because under Tex. Const. Art. I, § 8, it is the "preference of (the) court to sanction a speaker after, rather than before, the speech occurs." *Davenport*, 834 S.W.2d at 9. Further, this position comports with Tex. Const. Art. I, § 8, which both grants an affirmative right to "speak…on any subject," but also holds the speaker 'responsible for the abuse of that privilege.'" *Id*. The basis of the rule is that there is a presumption that pre-speech sanctions or "prior restraints" are unconstitutional. *Id*.

The Supreme Court of Texas noted that many years ago this Court (the TCCA) also relied on the state constitution to void injunctions prohibiting publication of trial testimony. *See* *Ex Parte McCormick*, 88 S.W.2d 104 (Tex. Crim. App. 1935) (orig. proceeding) and *Ex Parte Foster*, 71 S.W. 593, 595-596 (Tex. Crim. App. 1903). Other states have also found that their laws provide greater freedoms than the U.S. Constitution, as the Ohio Supreme Court referred to the Ohio Constitution as a "document of independent force." *Arnold v. City of Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993); *see also* *State v. Cardenas-Alvarez*, 25 P.3d 225, 231 (N.M. 2001) (Holding that although a prolonged checkpoint-stop was not illegal under the Fourth

Amendment, it was illegal under the New Mexico Constitution: "[T]he extra layer of protection from unreasonable searches and seizures involving automobiles is a distinct characteristic of New Mexico constitutional law."); and *State v. Randolph*, 74 S.W.3d 330 (Tenn. 2002) (Although in *California v. Hodari D.*, 499 U.S. 621, 626 (1991) the SCOTUS limited the reach of *United States v. Mendenhall*, 446 U.S. 544 (1980), which had held that a seizure occurs when a person reasonably believes he is not free to leave the scene, by holding that a person is "seized" under the Fourth Amendment only where an officer uses physical force to detain a person or where a person submits or yields to a show of authority by the officer, the Tennessee Supreme Court rejected *Hodari D* and opted to find that the defendant was "seized" under the Tennessee Constitution, which it determined provides greater protections than the Fourth Amendment).

Third, the Court of Appeals also erred because a violation of law found in statutes does **not** prohibit suppression under Art. 38.23(a). A trial court "[n]ecessarily abuses its discretion if it refuses to suppress evidence that is obtained **in violation of the law** and that is, therefore, inadmissible under article 38.23." *Wilson v. State*, 311 S.W.3d 452, 458 (Tex. Crim. App. 2010) (emphasis supplied). The SCA and Art. 18.21 are statutes that that are "the law," and Tex. Code Crim. Proc. Art. 38.23(a) (2016) addresses where a person's constitutional and **statutory rights** are violated. *Johnson v. State*, 864 S.W.2d 708, 717-718 (Tex. App. Dallas

1993) (emphasis supplied), *affirmed*, *Johnson v. State*, 912 S.W.2d 227 (Tex. Crim. App. 1995); *see also* *Davidson v. State*, 25 S.W.3d 183, 186 fn.4 (Tex. Crim. App. 2000) (same).

The key phrase in Art. 38.23 is "any provisions." ("No evidence obtained by an officer or other person in violation of **any provisions** of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.") Tex. Code Crim. Proc. Art. 38.23(a) (2016) (emphasis supplied). What does "any provisions" mean here? It means ***any part of the constitution or law.*** Words and phrases must be read "in context and construed according to the rules of grammar and common usage." Tex. Gov. Code § 311.011(a) (2018). And, "[t]he import of language, plain or not, must be drawn from the surrounding context, particularly when construing everyday words and phrases that are inordinately context-sensitive." *City of Rockwall v. Hughes*, 246 S.W.3d 621, 632 (Tex. 2008). The Supreme Court of Texas provides a clear example showing that some familiar words, depending on how they are used, convey opposite meanings. For example, "sanction" may indicate approval ("I sanction eating that bowl of ice cream.") or disapproval ("My wife will sanction me for eating that bowl of ice cream."). *City of Rockwall*, 246 S.W.3d at 632 fn.2. Its meaning (permission or prohibition) thus turns entirely on context. Further, "given the enormous power of context to transform the

meaning of language, courts should resist rulings anchored in hyper-technical readings of isolated words or phrases. The import of language, plain or not, must be drawn from the surrounding context." *Wenske v. Ealy*, 521 S.W.3d 791, 797 (Tex. 2017). Finally, courts should decline to apply "mechanical rules or require the use of 'magic words.'" *Id*.

Turning to the plain-language of Art. 38.23(a) and its key phrase, "any provision," "provision" means "[A] clause in a statute, contract, or other legal instrument." Black's Law Dictionary 1240 (7th ed. 1999). Other sources have defined it the same. *See* Dictionary.com, *provision*: (a clause in a legal instrument, a law, etc., providing for a particular matter…," available at http://www.dictionary.com/browse/provisions, last accessed on April 1, 2018; Merriam Webster Online, provision: a stipulation (as a clause in a statute or contract) made beforehand, available at https://www.merriam-webster.com/dictionary/provision, last accessed on April 1, 2018.

In summary, "any provision" means ***any part (any clause) of the constitution or law.*** It does **not** mean only those parts or clauses that a court or prosecutor believe should apply.

iii. Tex. Code Crim. Proc. Art. 38.23(a) is intended to provide greater protection than the Fourth Amendment provided that a constitutional violation is identified

Appellant explains above to some length that a State is free to provide greater protections to its citizens than what the U.S. Constitution provides. Here, Appellant will go into additional detail. As explained in the PDR, the Opinion perpetuates an anomaly that was **not** intended by the Legislature: "[T]herefore, suppression is not available to criminal defendants based on a violation of the SCA or of Article 18.21, so long as the violation is not also a violation of a **constitutional right**." *Sims*, 526 S.W.3d at 642 (emphasis supplied). Based on this logic, if a defendant can show that his rights under the Fourth Amendment or Tex. Const. Art. I, § 9 are violated, the defendant would be entitled to suppression, but the defendant is **not** entitled to suppression under Art. 38.23(a).

As support, the Opinion cites two Fifth Circuit cases that provide **no** guidance since Art. 38.23(a) does not apply in federal cases where a federal statute was alleged to have been violated. The Opinion also cites *Love v. State*, No. AP-77,024, 2016 Tex. Crim. App. LEXIS 1445 at *7 fn.8 (Tex. Crim. App. Dec. 7, 2016). The Court of Appeals appears to rely on this footnote in *Love*, which provides in relevant part,

> "[W]e note that both the federal and state statutes upon which Appellant relies expressly rule out the suppression of evidence as an available remedy—unless that statutory violation also "infringes on a right of a party guaranteed by a state or federal constitution." Article 18.21, §§ 12 & 13. Before we may invoke the general exclusionary remedy

> embodied in Article 38.23, therefore, we must identify (as we have) a constitutional violation."

However, Art. 38.23(a) allows a person whose privacy rights are violated to bring a civil suit, but this language **neither** prohibits an aggrieved party from seeking relief for a violation under Art. 38.23(a) **nor** expressly prohibits suppression under Art. 38.23(a). Further, in *Love*, this Court did **not** conclude that "[T]herefore, suppression is not available to criminal defendants based on a violation of the SCA or of Article 18.21, so long as the violation is not also a violation of a constitutional right." *Sims*, 526 S.W.3d at 642. What this Court discussed is that "Before we may invoke the general exclusionary remedy embodied in Article 38.23, therefore, we must identify (as we have) a constitutional violation." *Love*, *id*. at *19 fn.8.

This means that provided a constitutional violation is identified, Art. 38.23(a) provides greater protection than the Fourth Amendment. Underlying Appellant complaints are violations of the Fourth Amendment. Appellant's motion to suppress in part sought suppression of: (1) the warrantless seizure of the location-data evidence ("pinging") of a cellphone under the Fourth Amendment and Tex. Code Crim. Proc. Art. 38.23(a) (2016), and (2) the warrantless arrest of Appellant under the Fourth Amendment and Tex. Code Crim. Proc. Art. 38.23(a) (2016). (CR.240-245.362-387). It was the violations of the Fourth Amendment that lead to the seizure of Appellant and his cellphone information. Thus, Appellant has identified the "constitutional violation."

However, Appellant urges that the narrow reading of Art. 38.23(a) in *Love* (that a defendant must first identify the constitutional violation) should **not** be the law. Instead, per the plain-language of Art. 38.23(a), a defendant should be allowed to invoke it even when there has not been a constitutional violation identified. The reason goes back to the fact that many cases have concluded that Tex. Code Crim. Proc. Art. 38.23(a) (2016) is intended to provide greater protection than the Fourth Amendment. These cases do **not** suggest that Art. 38.23(a) is available only for when a constitutional violation is also identified.

For instance, in *Miles v. State*, 241 S.W.3d 28, 35, 35 fn.25 (Tex. Crim. App. 2007), this Court observed that the Texas Legislature "…[e]nacted an exclusionary rule broader than its federal counterpart," and further noted that [Tex. Code Crim. Proc. Art. 38.23(a) (2016)] "[l]ays down a rule far broader than that existing in any other state…while the federal rule (Fourth Amendment) excludes only evidence illegally obtained by federal officers, and those cooperating with them, [Tex. Code Crim. Proc. Art. 38.23(a) (2016)] makes a clean sweep and excludes evidence thus obtained by anyone." Thus, if a violation of the Fourth Amendment or Tex. Const. Art. I, § 9 entitle the defendant to suppression for a violation of the SCA or of Article 18.21, then the defendant must be entitled to suppression under the broad Art. 38.23(a) regardless of whether a constitutional violation is identified. Further, by its plain-language, the only exception to Art. 38.23(a) is Art. 38.23(b), the good-faith

exception that applies only if "…the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause." Tex. Code Crim. Proc. Art. 38.23(b) (2016). There was no good-faith reliance on a warrant in Appellant's case because none of the law-enforcement officers attempted to obtain a warrant prior to seizing the evidence in question. And, there are no other exceptions to Art. 38.23(a). Any other conclusion leads to an irreconcilable anomaly and guts the effectiveness of Art. 38.23(a), which was not the intent of the Legislature.

An example is found in *State v. Hughes*, No. 03-14-00179-CR, 2016 Tex. App. LEXIS 2566 (Tex. App. Austin Mar. 11, 2016), pet. ref., No. PD-0382-16, 2016 Tex. Crim. App. LEXIS 194 (Tex. Crim. App. June 8, 2016), a *McNeely* blood-draw case. As the court of appeals observed, Art. 38.23(a) "broadly provides that '[n]o evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.'" *Id*. at *9. And, "…the Legislature has authorized only one exception to this rule" [which is Art. 38.23(b)]. There is "no exception based on an officer's compliance with the law as it existed at the time of the search." *Id*. And noting that the Fourth Amendment contains exceptions that are **not** present in [Art. 38.23(a)], "the Texas exclusionary rule is broader in scope and provides

more protection to a suspect than its federal counterpart…" Although *Hughes* involved a constitutional violation (Fourth Amendment under *McNeely*), to invoke Art. 38.23(a), that defendant was **not** required to identify a constitutional violation.

Thus, this Court should hold that to invoke Art. 38.23(a), all a defendant must do is: (1) identify a violation of "any provision" of Texas or federal law; and (2) assert the violation of his rights, meaning that the violation of "any provision" of Texas or federal law invaded the defendant's personal rights. *See* *Chavez v. State*, 9 S.W.3d 817, 819 (Tex. Crim. App. 2000), overruled on other grounds by *Riley v. State*, 889 S.W.2d 290 (Tex. Crim. App. 1994).

iv. It is irrelevant that the Federal Stored Communication Act and Tex. Code Crim. Proc. Art. 18.21 do not provide that suppression is available since they are laws of Texas and the United States, and neither prohibits suppression of illegally obtained evidence under Art. 38.23(a).

The SCA is a "law of the United States." Tex. Code Crim. Proc. Art. 18.21 (2016) is Texas law. As explained above, Art. 38.23(a) is intended to be "broader than that existing in any other state" and thus has broad reach and power. In fact, as observed in *McClintock v. State*, No. PD-1641-15, 2017 Tex. Crim. App. LEXIS 291, at *19 (Tex. Crim. App. March 22, 2017) (designated for publication), "…[t]he language of the statutory exception (under Tex. Code Crim. Proc. Art. 38.23(a)) is broad enough to embrace the fruit-of-the-poisonous-tree doctrine."

Only if there was an "intervening circumstance" that "attenuates the taint" should evidence seized in violation of a law or statute **not** be suppressed under Art. 38.23(a). This issue the applicability of Art. 38.23(a) to violations of statutes like the SCA and Art. 18.21 was addressed in *State v. Jackson*, 464 S.W.3d 724 (Tex. Crim. App. 2015): officers placed a GPS tracking-device on the defendant's car to determine when and where he was obtaining drugs. *Id*. at 726. Using the GPS, the officers monitored his movement as he traveled at speeds exceeding the speed-limit, but also **independently verified** that he was speeding by pacing his car in their own unmarked vehicles. *Id*. An officer who was aware of the narcotics investigation verified by radar that the defendant was speeding and stopped him. *Id*. Without issuing the defendant a speeding-citation, the officers obtained his consent to search his car and discovered methamphetamine in the trunk. *Id*. The defendant then confessed to possession of the drugs. *Id*.

Under Art. 38.23(a), the trial court granted the defendant's motion to suppress the drugs and confession, holding that because the search was accomplished through the installation and monitoring of the GPS-tracker, a violation of the law occurred [here a violation of Art. 38.23(a), and per Tex. Code Crim. Proc. Art. 38.23(a) (2016), evidence obtained in violation of the law must be suppressed. *Id*. The Eleventh Court of Appeals affirmed. *State v. Jackson*, 435 S.W.3d 819, 827-831 (Tex. App. Eastland 2014).

This Court reversed the court of appeals. ***First***, this Court observed that "…[n]either the Fourth Amendment…nor… our… statutory exclusionary rule [Tex. Code Crim. Proc. Art. 38.23(a) (2016)] requires the suppression of evidence that was not "obtained" as a result of some illegality. Appellant notes that this Court did **not** hold that suppression under Art. 38.23(a) is not allowed when a violation of the SCA or Tex. Code Crim. Proc. Art. 18.21 (2016) is alleged. This Court thus did **not** reverse based on the erroneous rationale of the Sixth Court of Appeals, that because the SCA and Tex. Code Crim. Proc. Art. 18.21 (2016) do **no** state, "suppression is available," or merely state that civil relief is available under the respective statutes, that relief under Art. 38.23(a) is precluded.

Second, this Court found that although the primary illegality was the on-going search via the GPS tracking-device that enabled the police to make the observations relied upon to justify the defendant's initial roadside detention, the independent verification of the defendant speeding was an "intervening circumstance," and thus since the "circumstance intervenes" between the primary illegality and the later discovery of evidence that is alleged to be "fruit of the poisonous tree," a reviewing court may regard it as an "intervening circumstance" factor and conclude that the illegal taint was attenuated. *Jackson*, 464 S.W.3d at 732-733. Thus, this Court ruled against the defendant because the officers independently verified that the defendant

was committing a violation that warranted him being stopped, and then consented to the search and confessed to the crime.

Other courts have found that where the alleged taint is attenuated, Art. 38.23(a) does **not** protect the defendant. *See* *Welcome v. State*, 865 S.W.2d 128, 134 (Tex. App. Dallas Aug. 20, 1993, pet. ref.) (Conviction for possession of cocaine was affirmed because although the officers arrested the defendant without probable cause, making the arrest unlawful, the defendant was not searched until the officers discovered an outstanding warrant, which attenuated the taint of the unlawful arrest. Thus, Art. 38.23(a) did not provide relief due to this attenuation) and *Amilpas v. State*, No. 01-14-00053-CR, 2015 Tex. App. LEXIS 4135 (Tex. App. Houston [1st Dist.] April 23, 2015) (Although the trial court erred by refusing to unseal a court order requiring his cellphone provider to disclose data to police to help them locate the defendant to execute an arrest warrant, this error was harmless beyond a reasonable doubt because the intervening circumstance of the observation of the defendant by the police possessing cocaine rendered the evidence sufficiently attenuated from the violation of the law); *but see, e.g.*, *State v. Stanley*, No. 09-15-00314-CR, 2016 Tex. App. LEXIS 9216 (Tex. App. Beaumont Aug. 24, 2016) (The trial court did not abuse its discretion by granting the defendant's motion to suppress evidence obtained during a warrantless search of his home because the conclusion that the taint of the warrantless search had not sufficiently attenuated when the

defendant signed the consent to search form was supported by the facts. The record was clear that the defendant gave consent outside of his house after the initial entry by law enforcement, the entry into the home was not part of a protective-sweep, the police asked for defendant's consent, and the illegal search by the police was calculated to cause "surprise or fear."). *See also* *Wilson v. State*, 277 S.W.3d 446, 449-450 (Tex. App. San Antonio 2008), affirmed, 311 S.W.3d 452 (Tex. Crim. App. 2010) (Where an officer created a false document that stated that the defendant's fingerprints were on the magazine of a gun used in a murder and the report was the cause of the defendant's confession, the State failed to meet its burden of showing that the violation and defendant's confession were so far removed that the taint of the violation of the law was attenuated).

In Appellant's case, there was **no** "intervening circumstance." Law enforcement found Appellant solely due to the violations of the SCA and Art. 18.21. On the day in question, beginning at about 5:00 p.m., by using information from cell towers along Indian Nation Turnpike in Oklahoma and without a warrant, officers had Verizon Wireless "ping" Appellant's cellphone. (RR2.93.115-119; RR3.10-11). Appellant purchased the phone a year before and was always in sole possession of it. (RR2.128-130). The exigent-circumstances form (Emergency Situation Disclosure) had had been submitted to Verizon (RR2.107.120-121; RR5.SX-4B) contains no explanation regarding what the "exigent-circumstance" may be and was

insufficient to meet the warrant-requirements (RR2.125; RR5.SX-4B). Even if it contained additional information, Verizon Wireless is not an "independent, detached magistrate." No application under Tex. Code Crim. Proc. Art. 18.21 was submitted for the information. (RR2.118-119).

From the tracking-data obtained illegally, the police tracked Appellant down at the motel and arrested him. (RR2.21.99.108.118). The officers never had a warrant to arrest Appellant. (RR2.28.31.35.37.64-65). Nor was a warrant obtained to obtain the electronic "pinging" information. (RR2.56). No attempt to obtain a warrant was made. (RR3.13). And, other than the information they already had received from their dispatch and another law-enforcement agency based on cell-phone pinging before they arrived at the motel, there was **no** evidence of apparent illegal activity in the room (i.e., nobody was entering or exiting the room, nobody was yelling or screaming in or about the room). (RR2.32-33.38-39.55-56.59). Finally, upon arrest, Appellant was **not** "Mirandized" (RR2.89-91), so he was not read the admonishments under Tex. Code Crim. Proc. Art. 38.22 § 2 (2018).

Appellant has explained why he is entitled to relief under Tex. Code Crim. Proc. Art. 38.23(a) (2016) for violations of these statutes. And, as explained above, Art. 38.23(a) provides far greater protections than the Fourth Amendment, and thus more than what a federal court may deem appropriate under the Fourth Amendment. These explanations should serve to rebut the erroneous conclusions of the Court of

Appeals, which cites federal cases that are not relevant since Art. 38.23(a) does not apply in federal criminal cases. *See* *Sims*, 526 S.W.3d at 641-642, citing *United States v. Wallace*, 857 F.3d 685, 689 (5th Cir. 2017), withdrawn and replaced by *United States v. Wallace*, 866 F.3d 605 (5th Cir. 2017); *United States v. Guerrero*, 768 F.3d 351, 358 (5th Cir. 2014); and *United States v. German*, 486 F.3d 849, 854 (5th Cir. 2007). These cases do not provide proper analysis regarding why Art. 38.23(a) should not require suppression. In *Wallace*, based on the court's interpretation of the reach of the **Fourth Amendment**, the Fifth Circuit held that suppression is **not** a remedy for a violation of either the federal pen-trap statute or Art. 18.21. *Wallace*, 866 F.3d at 608. The Fifth Circuit compared the wire-tap statute, which specifically provides for an exclusionary remedy, and the pen-trap statute, which provides only for fines and imprisonment for knowing violations (but does not state that exclusion is unavailable). *Id*. at 608-609. The Fifth Circuit is free to reach this conclusion, but Wallace was based on a violation of a federal statute, and again in federal cases, Art. 38.23(a) is not available to defendants.

Next, although the Court of Appeals admits that "[W]hile Article 38.23 clearly requires exclusion in the general case of a statutory or constitutional violation," the Court mistakenly concludes "[t]he federal and state statutes specifically applicable to the pinging of (Appellant's) cellphone say that suppression is not available." *Sims*, 526 S.W.3d at 643. Based on this erroneous conclusion, the Court of Appeals found

that "the specific exclusivity of remedies in the two statutes control the general terms of Article 38.23." *Id*. None of the cases cited conclude that. 38.23(a) is a statute of "general terms" that may be trumped by the provision of a "specific" statute when the "specific" statute makes no mention of Art. 38.23(a) expressly or by implication: *Burke v. State*, 28 S.W.3d 545, 547 (Tex. Crim. App. 2000) (analysis of Evading Arrest); *Mills v. State*, 722 S.W.2d 411, 413-414 (Tex. Crim. App. 1986) (comparison of Tex. Penal Code § 31.03 versus a "more specific statute," Tex. Penal Code § 32.46); or *Davidson v. State*, 249 S.W.3d 709, 721 (Tex. App. Austin 2008, pet. ref.) (discussion that Art. 18.21 does not govern orders to place tracking devices by federal agents)

The Court of Appeals discusses Tex. Gov. Code § 311.026 (2017), which provides: (a) If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both; and (b) If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail."

Undersigned counsel still is unable to find a case that held as the Court of Appeals, that Art. 38.23(a) is a statute of "general terms" that may be trumped by the specific provision of a "specific" statute, much less where the "specific" statute

makes **no** mention of Art. 38.23(a) expressly or by implication. In fact, as discussed above, just as a prosecutor may elect between a general and specific statute to prosecute (provided doing so is not for an improper purpose), a defendant should be permitted to elect Art. 38.23(a) even though it is more general and broad than many specific statutes or provisions that provide relief. By concluding that Art. 38.23(a) may be trumped by a "specific statute" that does not mention Art. 38.23(a) guts the power and reach of Art. 38.23(a), which was not what the Legislature intended. And although the SCA and Art. 18.21 allow civil remedies for violations of the terms of each statute, neither statute contains language that provides a variation of "suppression under Art. 38.23(a) or under a state-suppression statute is unavailable." If the Legislature and Congress intended this result, it would have stated so, but it did **not**.

2. **Ground 2: The Court of Appeals erred by holding that Appellant was not entitled to a reasonable expectation of privacy in the real-time, tracking-data that was illegally seized because under the Fourth Amendment and Tex. Code Crim. Proc. Art. 38.23(a), a person has a legitimate expectation of privacy in real-time tracking-data regardless of whether he is in a private or public location.**

    i. **The reasoning of the Court of Appeals that once a person leaves a private location, data relating to the location of his cellphone is open-game to warrantless searches is error and is not supported by the SCA or Art. 38.23(a)**

In both the trial court and before the Court of Appeals, Appellant argued that the State's warrantless use of real-time, tracking-data obtained from Verizon, which pertained to the location of his cellphone, was an unreasonable search in violation of the Fourth Amendment and Tex. Const. Art. I, § 9. *Sims*, 526 S.W.3d at 642-646; *see* U.S. Const. Amend IV. The Court of Appeals concluded, "…[w]hile there may be a legitimate expectation of privacy in real-time tracking data in private locations, the same tracking, when following a subject in public places, does not invade legitimate expectations of privacy. Where such surveillance took place on public highways, there was no legitimate expectation of privacy." *Sims*, 526 S.W.3d at 644.

What the Court of Appeals was stating is that once a person leaves a private location, data relating to the location of his cellphone is open-game to warrantless searches. This reasoning **cannot** be reconciled with a person's right to privacy under the Fourth Amendment, Tex. Const. Art. I, § 9, and Art. 38.23(a). Under the Fourth Amendment, the basis of assertions of relief is that a person's reasonable expectation

of privacy was violated. *Kothe v. State*, 152 S.W.3d 54, 59 (Tex. Crim. App. 2004). A defendant who seeks suppression of evidence obtained in violation of the Fourth Amendment must show that he personally had a reasonable expectation of privacy that the government invaded. *Id*. In other words, he must show that he was a victim of the unlawful search or seizure. *Id*. at 59; *see also Luna v. State*, 268 S.W.3d 594, 603-604 (Tex. Crim. App. 2008) (same). The same principles apply when a defendant asserts Art. 38.23(a) on a search-and-seizure issue. *See Rogers v. State*, 113 S.W.3d 452, 456-457 (Tex. App. San Antonio 2003, no pet.) (Discussion that like the Fourth Amendment, Art. 38.23 (when asserting a search-and-seizure claim) goes to an individual's legitimate expectation of privacy from unreasonable searches. A defendant has standing to challenge the admission of evidence obtained by a search only if the defendant had a legitimate expectation of privacy in the place invaded. The burden is on the defendant to show this, and to carry the burden, the defendant must prove that: (a) by his conduct, he exhibited an actual subjective expectation of privacy (a genuine intention to preserve something as private); and (2) circumstances existed under which society was prepared to recognize his subjective expectation as objectively reasonable.).

The Court of Appeals acknowledges that there is considerable debate among state and federal courts regarding whether warrantless searches are allowed in this situation. *Sims*, 526 S.W.3d at 643-644. Citing *Ford v. State*, 477 S.W.3d 321, 335

fn.18 (Tex. Crim. App. 2015), the Court of Appeals notes that Florida, New Jersey, Illinois, Indiana, Maryland, and Virginia require warrants for such information. *Sims*, 526 S.W.3d at 643-644. And, the Southern District of Texas has ruled that "real-time" location information may be obtained only under warrant supported by probable cause. *In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority*, 396 F.Supp.2d 747 (S.D. Tex. 2005).

ii. The Opinion of the Court of Appeals ignores the realities of cellphone technology

When a person uses her cellphone in her home, that person has a right to privacy to the contents of the phone and, as the Court of Appeals acknowledges, "[a] legitimate expectation of privacy in real-time tracking data in private locations" (such as her home). These principles have been established by *Riley v. California*, 134 S. Ct. 2473, 2489 (2014) and *State v. Granville*, 423 S.W.3d 399, 417 (Tex. Crim. App. 2014) (Officers **cannot** activate and search the contents of a cellphone that is stored in a jail property room without a search warrant.).

Under *Riley* and *Granville*, when the person leaves her home, she does **not** lose her right of privacy in her cellphone. Thus, it is not possible for a person to lose "the legitimate expectation of privacy in real-time tracking data" merely because the person leaves her home.

As discussed in the PDR, a comparison of how cellphone technology works can be made using how a landline works. When a person makes a call on a "landline," that person "voluntarily conveys" information (phone-number dialed) through the phone company. The "landline" phone is connected to copper wires that runs through a jack to a box outside, the "entrance bridge." This entrance bridge is connected to cable that runs along the road that either goes to the phone company's switch or a digital concentrator, which is a device that digitizes the person's voice and combines it with other voices that are sent along a coax cable to the phone company's office. There, the line is connected to a line card at a switch, which is the source of the "dial tone" when one picks up a landline. This process is "reversed" back to the destination of the call. There is **no** "tracking" of where the caller or recipient are because the source-and-destination-points are fixed. And, when a person makes a call on a landline, numbers dialed are turned over to the phone company. *Smith v. Maryland*, 442 U.S. 735, 742-743 (1979) (No legitimate expectation of privacy regarding numbers dialed on a landline because these numbers are volunteered to the phone company.).

However, cellphone technology works differently. As discussed by the Sixth Circuit in *United States v. Forest*, 355 F.3d 942, 951-952 (6th Cir. 2004), unlike dialed phone-numbers, cell-site data is not "voluntarily conveyed" by the user to the phone company, but instead is transmitted automatically during the registration

process, entirely independent of the cellphone user's input, control, or knowledge. Thus, comparing what a cellphone conveys to a cell-site to "a person travelling in an automobile on public thoroughfares" as held in *Knotts*, a case handed down in 1983, long before cellphones were used, is **not** a correct analysis. *Sims*, 526 S.W.3d at 644; citing *United States v. Knotts*, 460 U.S. 276, 281 (1983).

In *Ford*, 477 S.W.3d at 329, this Court held that "the Fourth Amendment does **not** prohibit the obtaining of information **revealed** to a third-party, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third-party will not be betrayed." (emphasis supplied). This Court agreed with the court of appeals that it is **not** relevant that the incriminating evidence was determined from records of **passive activity** on the cellphone since the defendant "…voluntarily availed himself of AT&T's cellular service, which includes the ability to receive data sent to a subscriber's phone, when he chose it as his provider." *Id*. at 331. Referring to this as "…a distinction without a functional difference" **ignores** the fact that a person uses a cellphone must subscribe to one of the few providers, all of whom keep real-time, tracking-data pertaining to the location of cellphones. To conclude that a person loses his expectation of privacy in real-time, tracking-data merely because he leaves his house using the rationale of "a person travelling in an automobile on public thoroughfares"

(as though the public or police can "see" the invisible waves automatically generated by a cellphone) ignores how cellphone technology works.

iii. The opinion of the Second Court of Appeals in *Harrison* provides sound guidance

Several years ago, the Second Court of Appeals addressed this issue in a case with similar facts. *In* *State v. Harrison*, No. 02-13-00255-CR, 2014 Tex. App. LEXIS 5853 (Tex. App. Fort Worth May 30, 2014), the police were investigating a murder by gunshot. During the investigation, Madden admitted arranging a drug deal between the deceased and the defendant. Madden showed the police numbers on his cellphone that he said belonged both men. *Id*. at *1-2. The police obtained the deceased's cellphone records without a warrant or court order and obtained an arrest warrant for the defendant. *Id*. at *2. Days later, the police obtained search warrants for the records of four cellphone numbers: the defendant's, the deceased's, Madden's, and a number belonging to one of the defendant's friends who had let him use his phone. By "pinging" one of the numbers, police were able to locate and arrest the defendant. *Id*. Instead of taking the defendant to a magistrate, the police questioned him for 7-8 minutes before reading his rights. *Id*. After the defendant waived his rights, he gave an oral statement to the police.

After obtaining appellee's statement, the police obtained additional search warrants for an old cellphone number of the defendant's and a cellphone of another

friend of defendant's whose phone defendant had been using. *Id*. at *2-3. The state also obtained records for two of the six cellphone numbers by judicial order under Art. 18.21(5) and the SCA, 18 U.S.C. § 2703(d). *Id*. at *3.

The defendant argued to the trial court (in relevant part) that the police violated Art. 18.21 and the SCA (18 U.S.C. §§ 2702, 2703, and 3117) by using the phone records obtained in violation of these statutes to elicit statements from the defendant after giving him *Miranda* and 38.22 warnings. *Id*. at *4-5. He also alleged that the police violated sections the SCA (2702, 2703, and 3117) by requesting pinging of one of the cellphones to locate him without first obtaining a court order or a warrant authorizing the pinging. *Id*. at *5.

The court of appeals opined that the SCA was enacted "to protect the privacy of users of electronic communications by criminalizing the unauthorized access of the contents and transactional records of stored wire and electronic communications, while providing an avenue for law enforcement entities to compel a provider of electronic communication services to disclose the contents and records of electronic communications," *id*. at *8-9, citing *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2703(d)*, 707 F.3d 283, 286-287 (4th Cir. 2013) (orig. proceeding). A provider covered by the SCA may disclose **noncontent** records to nongovernmental entities without restriction, 18 U.S.C. § 2702(c)(6), but 18 U.S.C. § 2702(b)(7)-(8) and (c) prohibits providers from voluntarily disclosing

customer records to a governmental entity unless an exception applies. The court of appeals rejected the State's argument that the "exception" was that "the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency." 18 U.S.C. § 2702(c)(4) (2016). As the court points out, this exception does **not** authorize law enforcement to access such data without a warrant during routine criminal investigations. *Harrison*, *id*. at *10, citing *In re Application of the United States*, 441 F.Supp.2d 816, 834 (S.D. Tex. 2006).

The court of appeals also noted that the SCA allows law enforcement to compel providers to give them information regarding customer cellphone records: (1) by obtaining a valid warrant under federal or state law, (2) by obtaining a court order upon a showing of specific and articulable facts showing that there are reasonable grounds to believe that the records are relevant and material to an ongoing criminal investigation, (3) by obtaining the consent of the subscriber or customer, or (4) by obtaining an administrative subpoena. *Id*. at *11, *citing* 18 U.S.C. § 2703(c), (d).

Critically, the court of appeals held that although the SCA does not require exclusion of evidence as a remedy for its violation, **Art. 38.23(a)** provides that no evidence obtained by an officer in violation of the constitution or laws of the State of Texas, or the Constitution or laws of the United States, may be admitted in

evidence against the accused in a criminal case. *Harrison*, *id*. at *11 (emphasis supplied). It was undisputed that the police did **not** obtain a warrant or court order to ping the cellphone numbers that led to the defendant's arrest. *Id*. at *11-12. Nor did the police obtain a court order or warrant for the other cellphone records. In fact, like in Appellant's case, the cellphone providers voluntarily gave this information to law enforcement. *Id*. at *12.

Finally, the court of appeals rejected the application of Section 2702(c)'s exigent-circumstances exception because "…there is no evidence of what law enforcement told the providers to justify the need for voluntary disclosure." Id. at *18. Further, the court of appeals found, even if it can infer that the officers expressed to the providers the information they relied on for the exception, "…the only information pertinent to the statutory exception is that officers were investigating a murder and that the murder weapon was a gun." *Id*. at *18-19.

In Appellant's case, all that was submitted to Verizon was the exigent-circumstances form (Emergency Situation Disclosure) (RR2.107.120-121; RR5.SX-4B), which contains no explanation regarding what the "exigent-circumstance" may be. (RR2.125; RR5.SX-4B). Instead, all the form asks is "Does this request potentially involve the danger of death or serious physical injury to a person, necessitating the immediate release of information relating to that emergency?," with "Yes" or "No" checkboxes. (RR2.125; RR5.SX-4B). This is **no** different than

what occurred in *Harrison* and provides no detail to Verizon regarding what the exigent circumstance was. Appellant believes that the analysis in *Harrison* is sound and should be adopted by this Court.

iv. The Fifth Circuit's most recent attempt to analyze warrantless-tracking under the SCA is unavailing and does not address Art. 38.23(a) because this law is not available in federal court

Finally, the Fifth Circuit recently (less than two weeks ago) attempted to address the issue of the reasonable expectation of privacy in the real-time, tracking-data. However, that Court's analysis cannot be reconciled with Texas law because Art. 38.23(a) does not exist in federal cases. And, despite the panel's holding, 7 of the 15 judges on the Fifth Circuit voted for rehearing en banc.

In *United States v. Wallace*, Nos. 16-40701 & 16-40702, 2018 U.S. App. LEXIS 7005 (5th Cir. March 20, 2018) (op. on reh.) (designated for publication) (Dennis, J. dissenting, 2018 U.S. App. LEXIS 7262), a confidential informant approached DPS Agent Hallett and gave Hallett Wallace's phone number and informed him that Wallace was a gang member and a wanted fugitive living in Austin. *Id*. at *2. Hallett verified this information and discovered an outstanding arrest warrant. *Id*. He passed this information to DPS Agent Rodriguez, who sought a Ping Order for authorization under both federal and state law to obtain real-time geolocation coordinates of the cellular device linked to the number given by the confidential informant (E911-data). *Id*. at *2-3. A Texas district court judge granted

the requested Ping Order for 60 days. *Id*. at *3. DPS discovered that Wallace's phone had been turned off. *Id*. Hallett obtained a new phone number for Wallace from the confidential informant. *Id*. Rodriguez applied for and was granted a second Ping Order for this new cellphone number. *Id*. With this Ping Order, DPS obtained the approximate, real-time GPS location of Wallace's cellphone from AT&T and located Wallace on private property off U.S. Highway 87 north of Victoria, Texas. *Id*. Officers arrested Wallace and seized ammunition and a pistol. *Id*. Wallace was charged with being a felon in possession of a firearm. *Id*.

Wallace filed to motion to suppress evidence, arguing that the Ping Order used to locate him was invalid because: (1) the information provided to the Texas district court was ambiguous, overbroad and conclusory, and (2) law enforcement was not engaged in an "ongoing criminal investigation" of the Defendant. *Id*. at *3-4. The motion to suppress was denied. *Id*. at *4.

The panel ruled that "suppression is not a remedy for a violation of either the federal pen-trap statute or the Texas Code of Criminal Procedure." *Id*. at *6. The panel cited some federal cases pertaining to the pen-trap statue, observing "Where Congress has both established a right and provided exclusive remedies for its violation, we would encroach upon the prerogatives of Congress were we to authorize a remedy not provided for by the statute." *Id*. And "[U]nlike the wire-tap statute which 'specifically provides for an exclusionary remedy when the statutory

requirements are not met,' the pen-trap statute provides only for fines and imprisonment for knowing violations." *Id*. at *7.

As for the "Texas Code of Criminal Procedure," the panel addressed only Art. 18.21. *Id*. **No** mention was made of Art. 38.23(a), but Wallace could not have asserted Art. 38.23(a) in federal court. As for the E911-data, the panel concluded that whether it "constitutes a search within the meaning of the Fourth Amendment is still an open question in this Circuit. Nor need we reach that issue here." *Id*. at *8. And, even if it constituted a Fourth Amendment search, DPS's actions would be covered by the good-faith exception to the exclusionary rule. *Id*., citing *United States v. Leon*, 468 U.S. 897, 919 (1984) and *Illinois v. Krull*, 480 U.S. 340, 342 (1987).

The dissenting opinions of Judges Dennis and Graves disagreed with this reasoning, and again, 7 of the 15 judges voted for an en banc rehearing. Dennis, J. dissenting, 2018 U.S. App. LEXIS 7262. The dissent rejected the good-faith exception under *Leon* and *Krull*. As the dissent correctly points out, in *Leon*, the SCOTUS held that evidence obtained by officers acting in objectively reasonable reliance on a search warrant later held not to be supported by probable cause need not be excluded from a criminal prosecution. And in *Krull*, the SCOTUS found that the rationale underlying *Leon* applied equally to evidence obtained by officers acting without a warrant but in objectively reasonable reliance on an administrative-inspection statute later held to be unconstitutional. *Krull*, 480 U.S. at 350-351. The

reasoning in *Krull* is that excluding evidence obtained under a statutorily authorized search would penalize the "officer for the [legislature's] error, rather than his own," and therefore could not "logically contribute to the deterrence of Fourth Amendment violations." *Id*. at 350 (*quoting Leon*, 468 U.S. at 921). Krull thus holds that law enforcement may defer to the constitutional judgment of the legislature if that judgment is expressed in clear statutory authorization for the officer's actions.

As the dissent also correctly points out, *Krull* cannot apply because "there is no similar legislative judgment as to the constitutionality of the officers' actions in this case." In *Krull*, the statute authorized warrantless administrative inspections of a regulated business. *Krull*, 480 U.S. at 360. There was no evidence suggesting that legislatures have enacted a significant number of statutes permitting warrantless administrative searches violative of the Fourth Amendment. Rather, legislatures have confined their efforts to authorizing administrative searches of specific categories of businesses that require regulation, and the resulting statutes usually have been held to be constitutional. *Krull*, 480 U.S. at 351. This showed a "clear pattern of legislative action and consistent court approval of such action." And because of this, the officer's reliance on the administrative-search statute was objectively reasonable. *Id*. at 357-359.

But in Wallace, there was no "legislative judgment or dialogue between the courts and the legislature as to the constitutionality of the real-time GPS surveillance

at issue." When Congress passed the SCA in 1986, there was no E911 requirement, and "GPS was still experimental military technology that would not begin to be in widespread civilian use until over a decade later." (internal citations omitted). The dissent also pointed out that five members of the current SCOTUS have expressed "grave doubt as to the constitutionality of the kind of warrantless, real-time GPS tracking at issue in this case," *citing* *United States v. Jones*, 565 U.S. 400, 415-418 (2012) (Sotomayor, J. concurring); *id*. at 425 (Alito, J. concurring in the judgment) (expressing concern that the majority's trespass-based reasoning was under-inclusive because it would provide no protection if "the Federal Government required or persuaded auto manufacturers to include a GPS tracking device in every car.").

Finally, the dissent pointed out that unlike the statute at issue in *Krull*, which reasonably appeared to authorize warrantless administrative searches, the SCA does not reasonably appear to authorize real-time GPS tracking. *Id*. at *6-7. While the statute in *Krull* required parties licensed to sell vehicles or vehicle parts to permit officials to inspect records pertaining to the purchase and sale of vehicles and parts and to allow "examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records," the SCA provides that, in certain enumerated circumstances, "[a] governmental entity may require a provider of electronic communication service…to disclose a record or

other information pertaining to a subscriber to or customer of such service (not including the contents of communications)." 18 U.S.C. § 2703)(c)(1) (2016). The panel's conclusion that "or other information" could include real-time GPS coordinates and claims that nothing else in the text of the SCA precludes such a reading ignores plain language in the SCA suggesting that real-time collection of GPS tracking information is not authorized by this statute.

Thus, the Fifth Circuit's most recent attempt to analyze warrantless-tracking under the SCA is unavailing because: (1) that Court does **not** have the benefit of Art. 38.23(a); and (2) the Wallace panel's reliance on the good-faith exception set forth in *Krull* and *Leon* are incorrect. This Court should **not** consider the good-faith exception under either Art. 38.23(b) or *Krull* and *Leon* because the officers admitted that they conducted the searches in violation of the SCA and Art. 18.21, and the exigent-circumstances assertions are without merit.

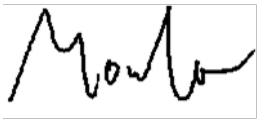
XI. Conclusion and Prayer

The Court of Appeals erred by affirming the denial of the motion to suppress evidence, and: (1) decided an important question of state and federal law that has not been, but should be, settled by this Court; and (2) decided an important question of state or federal law in a way that conflicts with the applicable decisions of this Court and the Supreme Court. *See* Tex. Rule App. Proc. 66.3 (2018). Appellant prays that

this Court reverse the Opinion, reverse the Judgment and sentence, reverse the denial of the motion to suppress, and remand this case back to the trial court for a new trial.

Respectfully submitted,

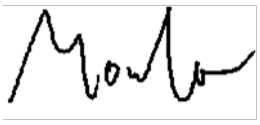
Michael Mowla
P.O. Box 868
Cedar Hill, TX 75106
Phone: (972) 795-2401
Fax: (972) 692-6636
michael@mowlalaw.com
Texas Bar No. 24048680
Attorney for Appellant



/s/ Michael Mowla
Michael Mowla

XII. Certificate of Service

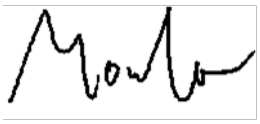
I certify that on April 2, 2018, this document was served on Gary Young and Jill Drake of the Lamar County District Attorney's Office by efile to gyoung@co.lamar.tx.us and jdrake@co.lamar.tx.us; on Jeff Shell by efile to jws0566@yahoo.com; and on Stacey Soule, State Prosecuting Attorney, and John Messinger, Assistant State Prosecuting Attorney, by efile to stacey.soule@spa.texas.gov, john.messinger@spa.state.tx.us, and information@spa.texas.gov. *See* Tex. Rule App. Proc. 9.5 (2018) and Tex. Rule App. Proc. 68.11 (2018).



/s/ Michael Mowla
Michael Mowla

XIII. Certificate of Compliance with Tex. Rule App. Proc. 9.4

I certify that this document complies with: (1) the type-volume limitations because it is computer-generated and does not exceed 15,000 words. Using the word-count feature of Microsoft Word, this document contains **12,819** words *except* in the following sections: caption, identity of parties, counsel, and judges, table of contents, table of authorities, table of appendix, statement of the case and jurisdiction, statement regarding oral argument, grounds presented, signature, certificate of service, certificate of compliance, and appendix; and (2) the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point font. *See* Tex. Rule App. Proc. 9.4 (2018).



/s/ Michael Mowla
Michael Mowla

Appendix

Sims v. State

Court of Appeals of Texas, Sixth District, Texarkana

June 30, 2017, Submitted; July 20, 2017, Decided

No. 06-16-00198-CR

Reporter
2017 Tex. App. LEXIS 6681 *; 2017 WL 3081399

CHRISTIAN VERNON SIMS, Appellant v. THE STATE OF TEXAS, Appellee

Notice: PUBLISH

Prior History: [*1] On Appeal from the 6th District Court, Lamar County, Texas. Trial Court No. 26338.

Core Terms

cell phone, suppression, tracking, probable cause, pinging, cellular telephone, search warrant, remedies, legitimate expectation of privacy, real-time, highway, recites, suppress evidence, credit card, provides, missing, murder, terms, constitutional violation, sanctions, searches, argues, arrest, motel, pet

Case Summary

Overview

HOLDINGS: [1]-Defendant's claim that evidence discovered as a result of the warrantless pinging of his cellular telephone as he disappeared after his grandmother was murdered and her car, keys, and purse were missing, should have been suppressed because it violated the Stored Communications Act and *Tex. Code Crim. Proc. Ann. art. 18.21* was rejected because those statutes provided that their remedies were exclusive, and the remedies did not include suppression of evidence; [2]-The specific exclusivity of remedies in the two statutes controlled the general terms of *Tex. Code Crim. Proc. Ann. art. 38.23*; [3]-The real-time tracking data appeared to have been used to track defendant to exclusively public places—a public highway and a public truck stop parking lot; therefore, defendant did not have a legitimate expectation of privacy of the location of his cell phone.

Outcome
Conviction affirmed.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Stored Communications Act

Civil Rights Law > Protection of Rights > Privacy Rights > Electronic Communications

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > Electronic Beepers, Pagers & Tracking Devices

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN1[] **Federal Acts, Stored Communications Act**

Violations of the Federal Stored Communication Act (SCA) and of *Tex. Code Crim. Proc. Ann. art. 18.21* do not require suppression of the evidence discovered thereby.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Suppress

HN2[] **De Novo Review, Motions to Suppress**

An appellate court reviews the trial court's legal rulings on motions to suppress de novo.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Stored Communications Act

Civil Rights Law > Protection of Rights > Privacy Rights > Electronic Communications

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > Electronic Beepers, Pagers & Tracking Devices

HN3[] **Federal Acts, Stored Communications Act**

The Stored Communications Act (SCA) sets out terms under which government entities, including law enforcement agencies, may obtain disclosure of information from providers of electronic communications services, including mobile telephone carriers. *18 U.S.C.S. § 2703*. Without providing any exclusionary rule, the SCA provides for civil actions for violations of its terms and makes the remedies and sanctions described in this chapter exclusive. *18 U.S.C.S. §§ 2707* (civil actions), 2708 (exclusivity of remedies).

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Stored Communications Act

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > Electronic Beepers, Pagers & Tracking Devices

Civil Rights Law > Protection of Rights > Privacy Rights > Electronic Communications

HN4[] Federal Acts, Stored Communications Act

The plain language of 18 U.S.C.S. § 2703(c) of the Stored Communications Act states that the government may obtain a court order requiring a cellular telephone company to turn over records or other information related to its customers.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Stored Communications Act

Civil Rights Law > Protection of Rights > Privacy Rights > Electronic Communications

Governments > Legislation > Statutory Remedies & Rights

HN5[] Federal Acts, Stored Communications Act

18 U.S.C.S. § 2708 of the Stored Communications Act provides that the remedies and sanctions described in the Act are the only judicial remedies and sanctions for nonconstitutional violations of the Act.

Civil Rights Law > Protection of Rights > Privacy Rights > Electronic Communications

Governments > Legislation > Statutory Remedies & Rights

HN6[] Privacy Rights, Electronic Communications

Parallel to the Federal Stored Communications Act (SCA) is *Tex. Code Crim. Proc. Ann. art. 18.21* of the Texas Code of Criminal Procedure, which sets out its terms for disclosure, provides for civil actions, but no exclusion of evidence, for its violation, and states that the remedies and sanctions described in the article are the exclusive judicial remedies and sanctions for a violation of the article other than a violation that infringes on a right of a party guaranteed by a state or federal constitution. *Tex. Code Crim. Proc. Ann. art. 18.21, §§ 4-5B* (terms for disclosure), *§ 12* (cause of action), § 13 (exclusivity of remedies).

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Stored Communications Act

Civil Rights Law > Protection of Rights > Privacy Rights > Electronic Communications

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > Electronic Beepers, Pagers & Tracking Devices

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN7[] Federal Acts, Stored Communications Act

Suppression of evidence is not available to criminal defendants based on a violation of the Stored Communications Act or of *Tex. Code Crim. Proc. Ann. art. 18.21*, so long as the violation is not also a violation of a constitutional right.

Governments > Legislation > Interpretation

HN8 **Legislation, Interpretation**

It is a rule of statutory construction that the specific should control the general in case of an irreconcilable conflict.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > Electronic Beepers, Pagers & Tracking Devices

HN9 **Search & Seizure, Scope of Protection**

The Texas Constitution does not reach further than the *Fourth Amendment to the United States Constitution* in situations in which the State is attempting to acquire an appellant's cell phone records from a third party.

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > Electronic Beepers, Pagers & Tracking Devices

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN10 **Eavesdropping, Electronic Surveillance & Wiretapping, Electronic Beepers, Pagers & Tracking Devices**

Only in certain circumstances might an individual have a legitimate expectation of privacy in third-party information concerning the location of that individual's cell phone. Courts have considered that location information can be of three basic types, (a) real-time tracking information, (b) intermediate-term information, and (c) long-term location information. The safest, least controversial type of data is the intermediate-term information. In Texas, there is no legitimate expectation of privacy in four days' cell phone location information obtained from the carrier. Longer term, pattern data showing places an individual visits over an extended period of time is suspect, in that individuals may very well have legitimate expectations of privacy in such data, which maps out the patterns of their daily lives. Real-time, tracking data has been debated among the courts.

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > Electronic Beepers, Pagers & Tracking Devices

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN11 **Eavesdropping, Electronic Surveillance & Wiretapping, Electronic Beepers, Pagers & Tracking Devices**

While there may be a legitimate expectation of privacy in real-time tracking data regarding the location of an individual's cell phone in private locations, the same tracking, when following a subject in public places, does not invade legitimate expectations of privacy. Where such surveillance takes place on public highways, there is no legitimate expectation of privacy.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN12 **Search & Seizure, Expectation of Privacy**

A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > Totality of Circumstances Test

HN13 **Probable Cause, Totality of Circumstances Test**

When reviewing whether a warrant affidavit supports a finding of probable cause, an appellate court does not consider facts in isolation, but examines the affidavit(s) from the totality of the circumstances. In determining whether an affidavit provides probable cause to support a search warrant, an issuing court and a reviewing court are constrained to the four corners of the affidavit. The appellate court must examine the supporting affidavit to if it recited facts sufficient to support conclusions (1) that a specific offense was committed, (2) that the property or items to be searched for or seized constitute evidence of the offense or evidence that a particular person committed it, and (3) that the evidence sought is located at or within the thing to be searched. Tex. Code Crim. Proc. Ann. art. 18.01(c) (Supp. 2016). The appellate court examines the affidavits for recited facts sufficient to justify a conclusion that the object of the search is probably within the scope of the requested search at the time the warrant is issued. The appellate court reviews the combined logical force of facts that are in the affidavit.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause

HN14 **Search Warrants, Probable Cause**

Affidavits for arrest or search warrants should be interpreted in a common sense and realistic manner, and once a magistrate has found probable cause, warrants should not thereafter be invalidated through a hypertechnical interpretation of Taunton v. State.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause

HN15[] **Search Warrants, Probable Cause**

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, giving all of the circumstances set forth in the affidavit there is a fair probability that evidence of a crime will be found in a particular place.

Judges: Before Morriss, C.J., Moseley and Burgess, JJ. Opinion by Chief Justice Morriss.

Opinion by: Josh R. Morriss, III

Opinion

Early in the afternoon of December 18, 2014, the body of Annie Sims was discovered on the back porch of her Powderly, Texas, home with a bullet in her head. Missing were Annie's live-in grandson, Christian Vernon Sims (Sims), his girlfriend, Ashley Morrison, Annie's vehicle, and Annie's purse, its contents including credit cards and at least one handgun. Officers suspected that the missing couple caused Annie's death and had taken the missing items from Annie's house. The officers' investigation was assisted by Sims' grandfather and Annie's husband, Mike Sims, as well as Sims' father, Matt.

Sims and Morrison were identified as having charged on Annie's credit card in McAlester, Oklahoma, shortly before the discovery of Annie's body. Starting around 5:00 p.m. that evening and without a warrant, officers had Sims' mobile carrier "ping" or track Sims' cellular telephone[1] by using information from cell towers along a highway in Oklahoma, Sims' northerly path of travel. Using the tracking data, officers learned, **[*2]** first, that Sims' cell phone was somewhere on that northbound highway, north of McAlester, and, later, at a Sapulpa, Oklahoma, truck stop located further north along the same highway. Oklahoma officers soon located Annie's vehicle in the parking lot of a motel across the highway from the truck stop. Armed with the license number from the vehicle, officers learned from the motel desk clerk that Sims and Morrison had rented room 275 in that motel. From that room, both suspects were arrested peacefully at approximately 8:25 p.m. At the motel, without being questioned, Sims told officers, among other things, "[Morrison] had nothing to do with it. It was all me."

After the denial of Sims' various motions to suppress evidence, he and the State entered into a plea agreement, under which Sims pled guilty to Annie's murder and was sentenced to thirty-five years' imprisonment. Having retained the right to appeal the denial of his motions to suppress and urging that at least one of his motions was erroneously denied, making Sims' plea of guilty allegedly involuntary, Sims appeals in three points of error. In the first two points, Sims claims that evidence discovered as a result of the warrantless **[*3]** "pinging" of his cellular telephone should have been suppressed because it both constituted a constitutionally unreasonable search and violated state and federal statutes. In his third point, Sims argues that the trial court should have also suppressed evidence discovered from the later, warrant-based, searches of his cellular telephone and Facebook account because the warrant affidavits were insufficient. Sims posits that, because he pled guilty only after his various motions to suppress had been

[1] Although Sims' cellular telephone used an account in the name of Mike Sims, the phone itself was purchased, possessed, and used only by Sims. The limited information Mike had the authority or ability to obtain, regarding Sims' cell phone use, did not include any content of communications or "substantive text messages, photos, or any other electronic — detailed electronic information from the provider." There is no claim that this special arrangement compromised any rights of Sims in the information concerning the phone's use or location.

denied, his conviction and sentence should be reversed and the case remanded to the trial court for further proceedings.

We affirm the trial court's judgment because (1) ***HN1***[⬆] violations of the *Federal Stored Communication Act (SCA)* and of *Article 18.21 of the Texas Code of Criminal Procedure* do not require suppression of the evidence discovered thereby, (2) there was no constitutional violation from this reasonable search in pinging Sims' cell phone, and (3) the affidavits for the search warrants for Sims' cellular telephone data and his Facebook account data support the trial court's findings of probable cause.

(1) Violations of the Federal Stored Communication Act and of Article 18.21 of the Texas Code of Criminal Procedure Do Not Require Suppression of the Evidence Discovered Thereby

Sims argues that **[*4]** the warrantless pinging of his cellular telephone to locate him, as he and Morrison travelled north through Oklahoma, violated both the Federal SCA and its counterpart Texas statute, requiring suppression of all evidence discovered as a result of the pinging. *See* *18 U.S.C. § 2702 (2015)*, *§ 2703 (2009)*; *TEX. CODE CRIM. PROC. ANN. art. 18.21* (West Supp. 2016).

HN2[⬆] We "review the trial court's legal rulings [on motions to suppress] de novo." *State v. Kelly, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006)*; *see* *Wiede v. State, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007)*. The State argues that suppression of evidence is not a remedy available to Sims under either the state or the federal statute and directs us to the very recent case *United States v. Wallace, 857 F.3d 685 (5th Cir. 2017)*. We agree that suppression is not a remedy for a non-constitutional violation of either statute.

The federal statute at issue here is the SCA, which is Title II of the Electronic Communications Privacy Act of 1986, as amended. *See* *18 U.S.C. §§ 2701-12 (SCA)*; *see also* *Pub. L. No. 99-508, 100 Stat. 1848 (1986)* (ECPA).[2] ***HN3***[⬆] The SCA sets out terms under which government entities, including law enforcement agencies, may obtain disclosure of information from providers of electronic communications services, including mobile telephone carriers. *See* *18 U.S.C. § 2703*.[3] Without providing any exclusionary rule, the SCA provides for civil actions for violations of its terms and makes the "remedies **[*5]** and sanctions described in this chapter" exclusive. *See* *18 U.S.C. §§ 2707* (civil actions), *2708* (exclusivity of remedies).[4]

HN6[⬆] Parallel to the SCA is *Article 18.21 of the Texas Code of Criminal Procedure*, which sets out its terms for disclosure, provides for civil actions, but no exclusion of evidence, for its violation, and states that "[t]he remedies and sanctions described in this article are the exclusive judicial remedies and sanctions for a violation of this article other than a violation that infringes on a right of a party guaranteed by a state or federal constitution." *See TEX. CODE CRIM. PROC. art. 18.21, §§ 4-5B* (terms for disclosure), *§ 12* (cause of action), *§ 13* (exclusivity of remedies).

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[2] For a helpful explanation of the components of the federal statutory scheme, *see* *United States v. McGuire, No. 2:16-CR-00046-GMN-PAL, 2017 WL 1855737, at *5 (D. Nev. Feb. 9, 2017)*.

[3] ***HN4***[⬆] "The plain language of *18 U.S.C. § 2703(c)* states that the government may obtain 'a court order' requiring a cellular telephone company to turn over 'record[s] or other information' related to its 'customer[s].'" *Wallace, 857 F.3d at 691*.

[4] ***HN5***[⬆] *Section 2708* provides, "The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." *18 U.S.C. § 2708*.

Therefore, ***HN7***[↑] suppression is not available to criminal defendants based on a violation of the SCA or of *Article 18.21*, so long as the violation is not also a violation of a constitutional right. *Wallace, 857 F.3d at 689*; *United States v. Guerrero, 768 F.3d 351, 358 (5th Cir. 2014)*, *cert. denied, 135 S. Ct. 1548, 191 L. Ed. 2d 643 (2015)*; *United States v. German, 486 F.3d 849, 854 (5th Cir. 2007)*; *see Love v. State, No. AP-77,024, 2016 Tex. Crim. App. LEXIS 1445, 2016 WL 7131259, at *7 n.8 (Tex. Crim. App. Dec. 7, 2016)* (to suppress evidence for violation of SCA or *Article 18.21*, court must find constitutional violation).

Sims argues that, by its explicit terms, Article 38.23 of the Texas Code of Criminal Procedure requires suppression in this case:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence **[*6]** against the accused on the trial of any criminal case.

TEX. CRIM. PROC. CODE ANN. art. 38.23(a) (West 2005). Understandably, Sims reasons that a violation of either the federal or the state statute requires, under Article 38.23(a), exclusion of the evidence. We disagree, because of ***HN8***[↑] the rule of statutory construction that the specific should control the general in case of an irreconcilable conflict. While Article 38.23 clearly requires exclusion in the general case of a statutory or constitutional violation, the federal and state statutes specifically applicable to the pinging of Sims' cell phone say that suppression is not available. Here, the specific exclusivity of remedies in the two statutes control the general terms of Article 38.23. *See Burke v. State, 28 S.W.3d 545, 547 (Tex. Crim. App. 2000)*; *Mills v. State, 722 S.W.2d 411, 413-14 (Tex. Crim. App. 1986)*; *Davidson v. State, 249 S.W.3d 709, 721 (Tex. App.—Austin 2008, pet. ref'd)*; *see also Love, 2016 Tex. Crim. App. LEXIS 1445, 2016 WL 7131259, at *7 n.8*.

We therefore overrule this point of error. Only if there was a constitutional violation should the trial court have suppressed the evidence found from pinging Sims' cell phone.

(2) There Was No Constitutional Violation from this Reasonable Search in Pinging Sims' Cell Phone

Sims also asserts that the State's warrantless use of the third-party data pertaining to the location of his cellphone was an unreasonable search in violation of the federal and state Constitutions. *See U.S. CONST. amend IV*; *Tex. Const. art. 1, § 9*. We disagree.[5]

HN10[↑] Only in certain circumstances **[*7]** might an individual have a legitimate expectation of privacy in third-party information concerning the location of that individual's cell phone. In discussing the subject, courts have considered that location information can be of three basic types, (a) real-time tracking information, (b) intermediate-term information, and (c) long-term location information. They suggest that the safest, least controversial type of data is the intermediate-term information. For example, Texas

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[5] ***HN9***[↑] The Texas Constitution does not reach further than the ***Fourth Amendment to the United States Constitution*** in situations in which the State is attempting to acquire an appellant's cell phone records from a third party. *Holder v. State, No. 05-15-00818-CR, 2016 Tex. App. LEXIS 9107, 2016 WL 4421362, at *13* (Tex. App.—Dallas Aug. 19, 2016, pet. granted); *see Hankston v. State, 517 S.W.3d 112, 121-22 (Tex. Crim. App. 2017)*.

precedent is that there is no legitimate expectation of privacy in four days' cell phone location information obtained from the carrier. *Ford v. State, 477 S.W.3d 321, 334-35 (Tex. Crim. App. 2015)*.

Longer term, pattern data showing places an individual visits over an extended period of time is suspect, in that individuals may very well have legitimate expectations of privacy in such data, which maps out the patterns of their daily lives. Five Justices of the United States Supreme Court have agreed that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *See United States v. Jones, 565 U.S. 400, 414, 132 S. Ct. 945, 181 L. Ed. 2d 911* (Sotomayor, J., concurring), 431 (Alito, J., concurring in the judgment) (2012); *see Ford, 477 S.W.3d at 332*.

The third type of data, real-time, tracking data, such as is the data used here, **[*8]** has been debated among the courts.

> [M]any federal courts that have considered the issue have concluded that "real-time" location information may be obtained only pursuant to a warrant supported by probable cause. *See In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority, 396 F. Supp. 2d 747 (S.D. Tex. 2005)*. Some states, too, require a warrant for real-time cell-site-location data[—]either under the *Fourth Amendment*, a state constitution, or a state statute. *See, e.g., In Tracey v. State, 152 So.3d 504, 526 (Fla. 2014)* (*Fourth Amendment*); *State v. Earls, 214 N.J. 564, 70 A.3d 630, 644 (N.J. 2013)* (New Jersey Constitution); *725 ILL. Comp. Stat. 168/10*; *Ind. Code 35-33-5-12*; *Md. Code Ann. Crim. Proc. § 1-203.1(b)*; *Va. Code Ann. § 19.2-70.3(C)*. their supporting affidavits. *Illinois v. Gates, 462 U.S. 213, 236, 103 S. Ct. 2317, 76 L. Ed. 2d 527 . . . (1983)*; *Crider v. State, 352 S.W.3d 704, 707 (Tex. Crim. App. 2011)*. We will sustain the issuance of the warrant if "the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing." *Gates, 462 U.S. at 236* . . . (quoting *Jones v. United States, 362 U.S. 257, 271, 80 S. Ct. 725, 4 L. Ed. 2d 697 . . . (1960)*); *see Swearingen, 143 S.W.3d at 811*.

Ford, 477 S.W.3d at 335 n.18. But, ***HN11***[⬆] while there may be a legitimate expectation of privacy in real-time tracking data in *private* locations, the same tracking, when following a subject in *public* places, does not invade legitimate expectations of privacy. Where such surveillance took place on public highways, there was no legitimate expectation of privacy. *United States v. Forest, 355 F.3d 942, 951-52 (6th Cir. 2004)*, *vacated on other grounds, Garner v. United States, 543 U.S. 1100, 125 S. Ct. 1050, 160 L. Ed. 2d 1001 (2005)* (reasoning that federal agents' action in calling defendant's cell phone and hanging up before it rang in order to "ping" defendant's physical location was **[*9]** not search under *Fourth Amendment*, as it was possible for any member of public to view defendant's car) (citing *United States v. Knotts, 460 U.S. 276, 281, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983)* ***HN12***[⬆] ("A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."). "*Fourth Amendment* concerns might be raised . . . if real-time location information were used to track the present movements of individuals in *private* locations . . . . *Ford, 477 S.W.3d at 334* (emphasis added).

Here, the real-time tracking data appears to have been used to track Sims to exclusively public places—a public highway between McAlester and Sapulpa, Oklahoma, and a public parking lot of a Sapulpa truck stop, across the highway from the motel in which Sims and Morrison were ultimately found. We conclude that Sims did not have a legitimate expectation of privacy of the location of his cell phone in those locations. Therefore, there was no *Fourth Amendment* violation in that regard. *Id.* We overrule this point of error.

(3) The Affidavits for the Search Warrants for Sims' Cellular Telephone Data and His Facebook Account Data Support the Trial Court's Findings of Probable Cause

Sims argues that evidence from the later searches of his cell phone and of his Facebook account should have been suppressed **[*10]** because the supporting affidavits are insufficient to establish probable cause. We disagree.

HN13[⬆] When reviewing whether a warrant affidavit supports a finding of probable cause, we do not consider facts in isolation, but examine the affidavit(s) from the totality of the circumstances. *Illinois v. Gates, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)*; *Rodriguez v. State, 232 S.W.3d 55, 59-60 (Tex. Crim. App. 2007)*. In determining whether an affidavit provides probable cause to support a search warrant, an issuing court and a reviewing court are constrained to the four corners of the affidavit. *Taunton v. State, 465 S.W.3d 816, 822 (Tex. App.—Texarkana 2015, pet. ref'd)*. We must examine the supporting affidavit to see if it recited facts sufficient to support conclusions (1) that a specific offense was committed, (2) that the property or items to be searched for or seized constitute evidence of the offense or evidence that a particular person committed it, and (3) that the evidence sought is located at or within the thing to be searched. *Tex. Code Crim. Proc. Ann. art. 18.01(c)* (West Supp. 2016); *Taunton, 465 S.W.3d at 822*. We examine the affidavits for recited facts "sufficient to justify a conclusion that the object of the search is probably [within the scope of the requested search] at the time the warrant is issued." *State v. Delagarza, 158 S.W.3d 25, 26 (Tex. App.—Austin 2005, no pet.)*. We review "the combined logical force of facts that are in the affidavit." *Taunton, 465 S.W.3d at 822*; *Rodriguez, 232 S.W.3d at 62*.

> ***HN14***[⬆] Affidavits for arrest or search warrants should be interpreted **[*11]** in a "common sense and realistic manner," and once a magistrate has found probable cause, warrants should not thereafter be invalidated through a "hypertechnical" interpretation of
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> *Taunton, 465 S.W.3d at 821-22*.

Sims urges us to follow our opinion in *Taunton* and find that the affidavits here were insufficient. But there are significant differences between the *Taunton* affidavits and those related to the searches of Sims' cell phone and Facebook data. The *Taunton* affidavits failed to disclose any evidence that tied Taunton to the crimes that those affidavits described, any relationship between Taunton and the victims, or any information on how Taunton may have committed the crimes or was involved in their commission. *See id. at 823-24*.

The affidavit seeking a warrant to search Sims' cell phone recites that cell phones are commonly used in the commission of crimes, that the cell phone in question is controlled by Sims, and that the affiant believes that Sims' cell phone contains evidence of criminal activity, such as subscriber information, text messages, voice calls, and cell-tower and GPS site coordinates. The affidavit describes Annie's death by gunshot at her residence, Annie's missing vehicle, the suspicion of the neighbor **[*12]** and relative that Sims may be responsible for Annie's death, specific facts from the relative leading to her suspecting Sims' involvement, a specific search of the residence uncovering the absence of Annie's vehicle, purse, and purse contents, including credit cards and guns, the use of at least one stolen credit card by Sims and Morrison in Oklahoma within hours after the murder, the tracking of Sims' cell phone location leading to authorities' location of Annie's vehicle and, ultimately, to Sims and Morrison, themselves. The affidavit

also notes Sims' arrest in connection with the course of events. The affidavit concludes that there is "reason to believe that information gained from" Sims' cell phone "will be useful in the investigation."

These recitations within the four corners of the above affidavit include information missing from the *Taunton* affidavits: evidence suggesting a link between Sims and Annie's murder, setting out the relationship between Sims and Annie, and information suggesting that Sims may have shot Annie. The cell phone affidavit supports the trial court's finding of probable cause for the issuance of a search warrant for the contents of Sims' cell phone.

The affidavit **[*13]** seeking a warrant to search Sims' Facebook data, likewise, recites various facts, though its recitations were thinner than the facts set out in the cell phone affidavit. It asserts that Sims had a particular Facebook account and that the affiant believes that Sims' account "contains private messages, private messages with photographs, photographs, wall updates, and wall posts and other information" related to Annie's murder. It recites basic facts of Annie's murder, including the fatal gunshot wound, the missing vehicle, Sims being a suspect along with Morrison, basic facts on why Sims was a suspect in the murder, the missing purse, credit cards, and guns, Sims' and Morrison's use of the stolen credit card in Oklahoma, the use of Sims' cell phone tracking data to find and arrest Sims and Morrison. It, too, notes Sims' arrest in connection with these events.

As stated by our sister court, ***HN15***[] "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, giving all of the circumstances set forth in the affidavit . . . there is a fair probability that . . . evidence of a crime will be found in a particular place." *Wise v. State, 223 S.W.3d 548, 556 (Tex. App.—Amarillo 2007, pet. ref'd)*. It is reasonable to conclude, from the **[*14]** four corners of the affidavit that there is a fair probability that evidence of the crime would be found on Sims' Facebook account. This supports the trial court's finding of probable cause for the issuance of the search warrant for Sims' Facebook data. We overrule this point of error.

We affirm the judgment of the trial court.

Josh R. Morriss, III

Chief Justice

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Date Decided: July 20, 2017

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